IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No.....

EDWARD G. BUDD MANUFACTURING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Supreme Court of the United States:

Edward G. Budd Manufacturing Company, petitioner herein, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review an Order of that Court entered in this case on June 3, 1947, and shows as follows:

1. Summary Statement of Matters Involved

The petitioner is a Pennsylvania corporation, operating, among other plants, a plant at Detroit, Michigan, in which at the time in question it manufactured fabricated steel products, including heavy duty auto-truck bodies, aircraft bomb-bay doors, and miscellaneous stampings (R. 33).

The proceedings in the Circuit Court of Appeals for the Sixth Circuit were on petition filed in that Court by the National Labor Relations Board for enforcement of that Board's Order of January 30, 1946, directed to petitioner herein (R. 53).

The Order of the Board was made on a complaint (R. 22) issued by the Board on May 4, 1945, alleging that the petitioner had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act (49 Stat. 449, Title 29 U. S. C. A., Sec. 151)—specifically, as far as this case is now concerned, that petitioner violated Section 8(3) of the Act by discharging Oscar Owens (a foreman) on or about April 14, 1944 because he joined and assisted the Foreman's Association of America, hereinafter called the Union, and by refusing to reinstate him since that date for the same reason; and that petitioner violated Section 8(1) of the Act by, beginning on or about March 19, 1944, and at various times thereafter, interrogating petitioner's supervisors as to whether or not they were members of or were engaged in activities on behalf of the Union, by advising, urging and warning its supervisors to refrain from assisting, becoming or remaining members of the Union, by warning and threatening its supervisors that they would be discharged unless they resigned their membership in or

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ceased to engage in activities on behalf of the Union, by advising and warning its supervisors that rather than have the Union come into the Detroit plant it would shut down the plant, by vilifying, disparaging and expressing disapproval of the Union, and by stating to and informing its supervisors that it was opposed to and would prevent the organization of its supervisors in the Union. Petitioner duly filed and served a combined motion to dismiss and an answer (R. 26). In the motion it urged that the complaint should be dismissed because supervisors were not included within the guarantees of the National Labor Relations Act. The answer stated that, without waiving the motion, Oscar Owens was laid off and petitioner refused to reemploy him because as a supervisor "he attempted to organize members of the Company's supervision into a labor organization, and that, when warned that continuation of such action would result in his being laid off, he agreed to discontinue such activities but failed to do so, whereupon he was laid off." Further answering, petitioner denied that it advised and warned its supervisors that rather than have the Union come into the Detroit plant the plant would be closed down, and denied that it had "vilified" the Union.

The matter was heard by a Trial Examiner who filed his "Intermediate Report" (R. 31) in which he denied the motion to dismiss and found: (1) "that the foremen at the plant are supervisory employees who occupy an intermediate position between top management and the rank and file employees" (R. 36); (2) that "in their own departments, as supervisors, they exercise a good deal of discretion in carrying out their duties" (R. 37); (3) "that the Union activities of Owens played a part in his selection for lay-off. In any event, there is no dispute that he was refused further employment, which would normally have been offered him, solely because of his union activi-

ties. This in itself was a violation of Section 8 (3) of the Act" (R. 39); and (4) that either the petitioner's director of personnel or the plant manager questioned certain foremen as to their membership in the Union, told certain foremen that they must either resign from the Union or the Company, requested them to stop all organizational activity, and that "Subsequently, all foremen, separately or in small groups, were called before" the director of personnel and plant manager "and other supervisors and questioned as to why they wanted a union • • • They were told they did not need a union, that respondent did not want them to belong to a union, and that respondent was opposed to a Union of foremen" (R. 35), which "conduct constituted interference, restraint and coercion and is not protected as an exercise of free speech" (R. 36) and was a violation of Section 8 (1) of the Act.

Petitioner filed proper exceptions (R. 47).

In its "Decision and Order" (R. 53) dated January 30, 1946, the Board "adopts the findings, conclusions, and recommendations of the Trial Examiner" (R. 53). It ordered (R. 55), as far as this case is now concerned, that petitioner

> "1. Cease and desist from:
>
> (a) Discouraging membership in the Foreman's Association of America, by discharging, laying off or refusing to transfer to production jobs any of its supervisory employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of their employment;
>
> (b) In any other manner interfering with, restraining, or coercing its supervisory employees in the exercise of the right to self-organization, to form, join, assist or bar-

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gain collectively through Foreman's Association of America, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Oscar Owens immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges;

(b) Make whole Oscar Owens for any loss of pay he may have suffered by reason of the respondent's discrimination against him, by payment to him of a sum of money equal to the amount which he normally would have earned as wages during the period from the date of his discharge to the date of the respondent's offer of reinstatement, less his net earnings during such period;

(c) Post immediately at its plant at Detroit, Michigan, copies of the notice attached hereto, marked 'Appendix A.' Copies of said notice to be furnished by the Regional Director for the Seventh Region, shall, after being duly signed by the respondent, be posted by it immediately, upon receipt thereof, and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by other material;

(d) Notify the Regional Director for the Seventh Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith."

The petition of the Board to the Circuit Court of Appeals for the Sixth Circuit (R. 1) recited the proceedings before it, set forth the Board's Order, asserted that the Order had been duly served and that the Company had refused to comply with the Order and prayed for enforcement of the Order.

The answer of the petitioner in the Circuit Court of Appeals to the petition of the Board for enforcement (R. 6) urged in substance that the Board's Order should not be enforced because the foremen involved were not within the guarantees of the National Labor Relations Act in that they were not employees within the meaning of the Act, that they were not the kind of employees to whom Congress intended to grant the guarantees of the Act, and that the policies of the Act, the national welfare and the public interest would not be effectuated by holding these foremen to be within the Act.

On June 3, 1947, the Circuit Court of Appeals for the Sixth Circuit ordered enforcement of the Board's Order. (Under the procedure of the Sixth Circuit, the Court's Order operates as a decree, no separate decree being entered.) The Court stated in its Order (R. 321) that the findings of the Board were supported by substantial evidence,

> "And it having been decided by the Supreme Court that such supervisory employees and foremen are 'employees' within the meaning of the Act, Packard Motor Car Company v. National Labor Relations Board, — U. S. —, decided March 10, 1947: IT IS ACCORDINGLY ORDERED that

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the petition of the National Labor Relations Board for a decree enforcing its order herein of January 30, 1946, be sustained on the authority of that case * * *."

On June 23, 1947, the Labor Management Relations Act, 1947, was enacted (Public Law 101—80th Congress, Chapter 120). It, among other things, provides procedures to be taken in labor disputes, and in Title I amends the National Labor Relations Act, effective August 22, 1947.

Nowhere in the 1947 Act, including the amendments to the National Labor Relations Act, does Congress give the Board any power to proceed with such a case as this one, although Title I does specifically provide that representation matters processed under the Act prior to amendment are not to be affected for a stated period of time. In addition, under the 1947 Act, supervisors are no longer employees under the National Labor Relations Act and, therefore, no longer within the coverage of the Act.

To be more specific as to the effect of the Labor Management Relations Act on the instant case:

(a) Section 1 is entitled "Short Title and Declaration of Policy" and states in part that "It is the purpose and policy of this Act * * * to provide orderly and peaceful procedures * * *"

(b) As to the amendments to the National Labor Relations Act, Section 104 of Title I provides that:

"The amendments made by this title shall take effect sixty days after the date of enactment of this Act * * *."

Accordingly, the amendments become effective August 22, 1947.

(c) Section 2 (3) of the National Labor Relations Act (Definitions) is in part amended by Section 101 of Title I as follows:

> "The term 'employee' • • • shall not include • • • any individual employed as a supervisor • • •."

Section 2 of the National Labor Relations Act is also amended by Section 101 of Title I by adding a new subsection (11), reading:

> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Section 101 of Title I amends the National Labor Relations Act by adding a new Section 14 (a), reading:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

(d) Section 101 of the 1947 Act amends Section 10(a) of the National Labor Relations Act and reads in part:

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"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce."

Section 8 lists the unfair labor practices but, of course, none of them apply to supervisors because, as we have just shown, supervisors have not been within the coverage of the Act since August 22, 1947.

(e) In addition to the foregoing amendments to the National Labor Relations Act, Section 10(c) of the Act has been amended by Section 101 of the Labor Management Relations Act, 1947. However, for our purpose here, there has been no change in the language in Section 10 (c) as it has to do with an order of the Board when the Board finds an unfair labor practice:

"* * * the Board * * * shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, *as will effectuate the policies of this Act* * * *." (Emphasis supplied.)

II. Basis Upon Which This Court Has Jurisdiction to Review the Order of the Circuit Court of Appeals

(a) This Honorable Court has jurisdiction to review the Order of the said Circuit Court of Appeals under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 43 Stat. 938; Title 28, U. S. C. A., Sec. 347.

(b) The statutes of the United States involved in this proceeding are the Acts of Congress known as the National Labor Relations Act (Act of July 5, 1935, C. 372;

49 Stat. 449; Title 29, U. S. C. A., Sec. 151 *et seq.*), and the Labor Management Relations Act, 1947, (Public Law 101—80th Congress, Chapter 120), pertinent provisions of which are set forth on pages 7, 8 and 9 of this petition.

(c) The Order of the Circuit Court of Appeals for the Sixth Circuit now sought to be reviewed was filed by that Court on June 3, 1947 and is final, but should now be set aside because of the subsequent enactment of the Labor Management Relations Act, 1947.

III. Statement of Questions Involved

The questions presented are, no one to be considered as a waiver of any other:

(a) Whether the Order of the said Circuit Court of Appeals should be set aside because of the provisions of Title I of the Labor Management Relations Act, 1947, set forth on pages 6, 7 and 8 of this petition.

(b) Whether, because of the Labor Management Relations Act, 1947, the Board is now without power to further process this case and, therefore, the Order of the Sixth Circuit should be set aside.

(c) Whether, because of the Labor Management Relations Act, 1947, the Circuit Court of Appeals has no present legal power or jurisdiction to enforce the Board's Order.

(d) Whether the Order of the said Circuit Court of Appeals should be set aside because of the enforcement of that Order, due to the Labor Management Relations Act, 1947, would result in requiring a useless formality no longer authorized, commanded or sanctioned by law.

(e) Whether, in the light of the provisions of the Labor Management Relations Act, 1947, the remedial ob-

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jectives of the National Labor Relations Act, as amended, would be achieved by requiring compliance by petitioner with the Order of the said Circuit Court of Appeals.

(f) Whether, in the light of the provisions of the Labor Management Relations Act, 1947, the policies of the National Labor Relations Act, as amended, would be effectuated by requiring compliance with the Order of the said Circuit Court of Appeals.

(g) Whether, in the light of the provisions of the Labor Management Relations Act, 1947, the remedial objectives of the National Labor Relations Act, as amended, would be frustrated by requiring compliance by petitioner with the Order of the said Circuit Court of Appeals.

(h) Whether, in the light of the provisions of the Labor Management Relations Act, 1947, the policies of the National Labor Relations Act, as amended, would be frustrated by requiring compliance with the Order of the said Circuit Court of Appeals.

IV. Reason Relied On for the Allowance of the Writ

The decision of the said Circuit Court of Appeals, in the light of the aforesaid amendments to the National Labor Relations Act, decides an important question of Federal law which has not been, but should be, settled by this Court, and has the effect of deciding a federal question in a way probably in conflict with applicable decisions of this Court.

Wherefore, your petitioner prays that this Honorable Court grant its writ of certiorari directed to the Circuit Court of Appeals for the Sixth Circuit, requiring the complete record of this cause in said Court to be certified to this Court, and that this Court will thereupon proceed to correct the errors herein complained of.

And your petitioner will ever pray, etc.

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Dated: August 26, 1947.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The Order of the Circuit Court of Appeals is, as yet, unreported. It will be found on page 321 of the Record.

JURISDICTION

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of June 7, 1934, C. 426; 48 Stat. 926; Title 28, U. S. C. A., Section 347.

2. The Order of the Circuit Court of Appeals for the Sixth Circuit was filed June 3, 1947. No petition for rehearing was filed. (The last day for filing such a petition expired June 23, 1947 (Rule 28, Rules of the United States Circuit Court of Appeals for the Sixth Circuit), whereas Title I of the Labor Management Relations Act, 1947 did not become effective until August 22, 1947. This petition for certiorari is being filed after the effective date of Title I but prior to the expiration of the 90 days allowed by rule of this Court.)

3. The nature of the case, the ruling of the said Circuit Court of Appeals, and the reasons for the issuance of a writ of certiorari, are set forth in the foregoing petition.

4. The grounds upon which the writ is prayed are two of the reasons therefor contained in Rule 38 (5) of the Rules of this Honorable Court, to-wit:

(a) The decision of the said Circuit Court of Appeals (because of the subsequent enactment of the Labor Management Relations Act, 1947) decides an important question of federal law which has not been, but should be, settled by this Court.

(b) The decision of the said Circuit Court of Appeals (because of the subsequent enactment of the Labor Management Relations Act, 1947) has the effect of deciding a federal question in a way probably in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE AND QUESTIONS INVOLVED

In the interest of brevity, no attempt will be made to repeat the facts and questions presented as they are alleged in the foregoing petition for certiorari.

As we set forth in detail on pages 7, 8 and 9 of the foregoing petition, the amendments to the National Labor Relations Act, as found in Title I of the Labor Management Relations Act, 1947, provide that supervisors are no longer employees under the Act. Therefore, they are not now within the coverage of the Act.

Among other provisions, the amendments provide (Sec. 2 (3)) that "The term 'employee' * * * shall not include * * * any individual employed as a supervisor," and define "supervisor" (Sec. 2 (11)) as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

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The supervisors here involved, including Owens, clearly fall within the definition.

The Trial Examiner found (R. 36, 37) "that the foremen at the plant are supervisory employees who occupy an intermediate position between top management and the rank and file employees," and "in their own departments, as supervisors, they exercise a good deal of discretion in carrying out their duties."

In its "Decision and Order" (R. 53) the Board "adopts the findings, conclusions and recommendations of the Trial Examiner * * *"

We cite the following undisputed testimony, not only as substantial support for the Examiner's and the Board's findings as to these employees being supervisors, but because under the Administrative Procedure Act, Title 5, U. S. C. A., Section 1009 (e), as is said in *National Labor Relations Board v. Thompson Products, Inc.*, 6 Cir., ... F. 2d ..., 20 L. R. R. M. 2291, 2302, "the reviewing court in making its determinations shall 'review the whole record or such portions thereof as may be cited by any party * * *'"

The strata of supervisors in this plant, beginning at the top, was, at the time of the events here involved (R. 191), composed of the general manager, seven superintendents (R. 187), eight assistant superintendents, 38 general foremen, 78 foremen, and five assistant foremen (R .188). Leaders were not considered as supervisors (R. 159).

The only differences between foremen and assistant foremen were that the latter were temporary at times of peak production and were hourly rated rather than salaried (R. 214, 215).

The Company's supervisors supervised about 2900 rank and file employees (R. 189).

The general manager, superintendents, assistant superintendents, general foremen and foremen were all salaried (R. 188) and always had been (R. 191). The assistant foremen were hourly rated (R. 188). The salary range of general foremen was from $400 to $575 per month and of foremen from $325 to $400 per month. The hourly rate of assistant foremen ranged from $1.21 to $1.44 per hour (R. 189).

Owens received a salary of $390 a month (R. 189).

The individuals in this plant whom the Foreman's Association of America was trying to organize were the foremen and the general foremen (R. 73, 174). The officers of the local of the Foreman's Association of America who were interrogated in the offices of the Company were foremen (R. 74). It was the foremen who were subsequently interviewed by some of the Company's top management (R. 85).

Owens was a foreman (R. 94, 96, 110, 175).

These foremen and assistant foremen confined their work solely to supervisory duties (R. 194, 237). The Company had no so-called working foremen (R. 237).

Supervision had always been excepted from the Company's contracts with the union representing its rank and file employees (R. 192).

The grievance procedure established by those contracts, since 1937, provided that "In case the grievance cannot be settled between the employee or his chief steward and his foreman, the chief steward shall present the grievance in writing to the foreman of the department on a form provided for that purpose, and it shall be mandatory for the foreman of the department to acknowledge the receipt of the complaint in writing and enter his disposition thereon." This procedure was closely followed (R. 193).

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At least 90 per cent of the grievances of rank and file employees were settled by foremen (R. 195).

These foremen authorized pay rate changes of rank and file employees. They supervised the working force. It was their responsibility to place employees on the right jobs; to train employees to perform the jobs; to see to it that the proper quantity and quality of materials were produced and that their employees worked in a safe manner; that their departments were clean and orderly; to control scrap; and to get the right kind of stock and sufficient of it (R. 197). If scrap was being made, the foreman determined whether it was the fault of the employee or of improper equipment and tools, and he made recommendations for the correction of the condition. He saw to it that his department was properly manned as to the number of help and the type of employees. He recommended merit increases, and was responsible for automatic increases being granted at the proper time (R. 198). He saw to it that his production schedules were met (R. 199). "The foremen have more to do with discipline than anybody else" (R. 199, 200). "It is up to them to see that people behave themselves properly while in the plant, and that when they do not behave properly, then it is up to them to recommend disciplinary action up to and including discharge." Foremen determined during the 60 day probationary period of new employees whether such employees should be retained (R. 200). Foremen decided whether employees should be transferred from one department to another, and from one job to another (R. 201). It was the foreman's responsibility to change operations and change methods if by so doing he could improve the job "and he has complete authority to do so." He had authority to promote and demote. He saw to it that production costs were kept down (R. 203). He had a right to recommend discharges (R. 205).

He saw to it that people worked in accord with their seniority (R. 230). At times he was the one who made agreements with union representatives of the rank and file employees, and the Company was bound thereby (R. 233). He was solely responsible as to who worked overtime (R. 234).

In all of the foregoing the foreman exercised discretion (R. 208, 209).

It was after the foregoing testimony that the Trial Examiner, during the hearing, said (R. 257): "A foreman it has been testified to, has certain authority—call it limited—of course it is subject to control higher up, but certainly I will deduce that within the limits of his directing power in a particular department or shop, the foreman can do anything he wants to."

So that it is evident that the supervisors here involved are within the definition of the term "supervisor" contained in the amendments to the National Labor Relations Act.

STATUTES INVOLVED

The federal statutes involved are the National Labor Relations Act (Act of July 5, 1935, c. 372; 49 Stat. 449; Title 29, U. S. C. A., Section 151 *et seq.*) and the Labor Management Relations Act, 1947, (Public Law 101—80th Congress, Chapter 120) pertinent sections of each of which statutes are set forth on pages 7, 8 and 9 of the foregoing petition for certiorari. The following sections of the National Labor Relations Act, prior to the amendment thereof, are the ones upon which the Board found petitioner guilty of unfair labor practices:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organi-

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zations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"Sec. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *."

SPECIFICATION OF ERRORS TO BE ALLEGED

(No one specification of error is intended to waive any other.)

(a) The Board has no power under the law as it now exists to proceed to a conclusion with this case, and, therefore, the order of the Sixth Circuit enforcing the Board's Order should be set aside.

(b) The Circuit Court of Appeals, because of the provisions of the Labor Management Act, 1947, has no present legal power or jurisdiction of the Board's Order in this case.

(c) The Order of the Sixth Circuit in respect to the Board's Order requires a useless formality no longer authorized, commanded or sanctioned by law.

(d) The Order requires that petitioner (1) cease and desist from discouraging membership in the Foreman's Association of America, etc., (2) offer Oscar Owens (a foreman) reinstatement, (3) make him whole for any loss of pay, and (4) post the notice, no one of which is now required by law.

(e) The remedial objectives of the National Labor Relations Act, as amended, would not be achieved by now requiring petitioner, as the Order of the Sixth Circuit provides in respect to the Board's Order, to cease and desist from discouraging membership in the Foreman's Association of America, or from in any other way interfering with, restraining or coercing its supervisors in self-organizational activities, etc., inasmuch as the supervisors here involved are not now employees within the Act.

(f) The remedial objectives of the Act, as amended, would not be achieved by now requiring petitioner, as the Order of the Sixth Circuit provides in respect to the Board's Order, to offer to Oscar Owens immediate and full reinstatement to his former or substantially equivalent position and back pay.

(g) The remedial objectives of the Act, as amended, would not be achieved by requiring petitioner, as the Order of the Sixth Circuit provides in respect to the Board's Order, to post the notice designated by the Board (R. 57).

(h) It would not effectuate the policies of the Act, as amended, to now require petitioner to comply with the Order of the Sixth Circuit in respect to the Board's Order in that the amendments contained in Title I of the Labor Management Relations Act, 1947, furnish no foundation for enforcement.

(i) It would frustrate the remedial objections and policies of the National Labor Relations Act, as amended, to require compliance by the petitioner with the Order of the said Circuit Court of Appeals.

ARGUMENT

Petitioner urges that the writ of certiorari as prayed should be granted because important questions of federal law are involved which have not been but should be decided by this Court, and because the decision of the said Circuit Court of Appeals has the effect, due to the Labor Management Relations Act, 1947, of deciding a federal question in a way probably in conflict with applicable decisions of this Court.

More specifically, petitioner urges that because of the Labor Management Act, 1947 the Circuit Court of Appeals has no present legal power or jurisdiction to enforce the Board's Order. Further, that due to the 1947 Act the Order of the Sixth Circuit should be set aside because a court will not lend itself to requiring a useless formality no longer authorized, commanded or sanctioned by law; because the remedial objectives of the National Labor Relations Act, as amended, would not be achieved, nor the policies of the Act, as amended, be effectuated by enforcement of the Order of the Sixth Circuit; and because the objectives and policies of the Act, as amended, would be frustrated by the enforcement of the Board's Order as provided for in the Order of the Circuit Court of Appeals.

Under such circumstances and in the interest of justice it would seem that the last word, the ultimate guiding rule, should be announced by this Court as to whether an unfair labor practice involving supervisors, which arose under the Act prior to amendment and which is in the course of being processed by the Board, should proceed to a conclusion as though the Act had not been amended, and whether an order of the Board based on the Act prior to amendment should be enforced.

Federal questions of substance are presented which have not heretofore been determined by this Court.

The Board has not spoken decisively on the subject. In instructions issued to its regional offices under date of July 3, 1947, the Board stated as to election cases: "Dismiss immediately all petitions seeking certification of units involving supervisory employees. (Public Law No. 101, Sec. 2(3) states: 'the term "employee" • • • shall not include • • • any individual employed as a supervisor.')" (20 L. R. R. 149).

But it did not instruct the dismissal or continuance of unfair labor practice cases involving supervisors which arose under the Act prior to amendment, nor has it stated what its position is in respect to such cases. All it has said on the subject is contained in the instructions to which reference has just been made: "(2) Reexamine immediately all cases in which complaints have issued but in which hearings have not as yet started. If the alleged violations also constitute illegal conduct under the Act as amended, proceedings may go forward into hearings as scheduled. All other cases should be submitted to the Washington office of the Board with recommendations. (3) All future complaints are subject to the provisions of item 2."

We respectfully submit that the following are at least some of the pertinent matters in relation to the questions we have raised and that they should be presented more fully to this Court, as can be done after the issuance of the writ of certiorari:

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I.

THE CIRCUIT COURT OF APPEALS, BECAUSE OF THE PROVISIONS OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, HAS NO PRESENT LEGAL POWER OR JURISDICTION OF THE BOARD'S ORDER IN THIS CASE

A. Relevant events subsequent to the Order of the Sixth Circuit should be considered by this Court.

Relevant events subsequent to the date of the Order of the Sixth Circuit and subsequent to the Board's Order should be considered by this Court in deciding whether the Order of the Sixth Circuit should be set aside.

The rule for which we contend is stated in *Patterson v. Alabama*, 294 U. S. 600, 607, quoted with approval in *Ashcraft v. Tennessee*, 322 U. S. 143, 156, as follows:

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."

In *Carpenter v. Wabash Railway Co.*, 309 U. S. 23, 27, this Court adopted the statement of the rule as propounded by Chief Justice Marshall in *United States v. Schooner Peggy, 1 Cranch* 103, 110:

> "It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligations denied • • •

> In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

In the *Carpenter* case, *supra*, after a decision by a Circuit Court of Appeals to the effect that a judgment in a personal injury suit against the Railway did not constitute a preferred claim against the receiver, the federal Bankruptcy Act was amended (August 11, 1939, 53 Stat. 1406, subsection (n) of section 77) to provide that in such a receivership proceeding such claims were preferred. On that showing in a petition for certiorari, the writ was granted by this Court.

"A change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law." *Ziffrin, Inc. v. United States,* 318 U. S. 73, 78.

"It is the case that is here now that must be decided, and it must be decided on the basis of the circumstances that exist now. *Cf. Vandenbark v. Owens-Illinois Co.,* 311 U. S. 538, 542-43, and cases there cited." *Public Utilities Commission of Ohio v. United Fuel Gas Co.,* 317 U. S. 456, 466.

See as well *Watts, Watts & Co. v. Unione Austriaca Di Navigazione,* 248 U. S. 9, 21, and cases there cited.

In *National Labor Relations Board v. Jones & Laughlin Steel Corp.,* 67 S. Ct. 1274, the question originally before the Board, and the Circuit Court of Appeals, was whether members of a militarized plant protection force were entitled to the guarantees of the National Labor Relations Act. The Board answered in the affirmative. The Sixth Circuit came to the opposite conclusion on the ground that

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it would not be in the public interest to permit the organization of plant guards by the same union as that which represented the production employees (p. 1278). The Board petitioned the Supreme Court for certiorari, setting forth that the plant guards were no longer militarized. In issuing certiorari (325 U. S. 838), the Supreme Court set aside the order of the Circuit Court of Appeals and instructed that Court to determine whether the fact that the guards were no longer militarized affected its previous conclusions.

In the course of the Supreme Court's opinion, it was said (p. 1278) that the validity of the Board's order

> "* * * must be judged as of the time when it was issued, a time when the guards were still militarized. *This is not to say, however, that events subsequent to demilitarization are irrelevant in deciding whether the order should be enforced.*" (Emphasis supplied.)

Later in the Supreme Court opinion (p. 1280) it appears that after the Board's order was issued and after the guards at one of the plants were demilitarized, the guards were deputized by police authorities. "The Board claims that since this matter was not raised before it, the court below was precluded by Sec. 10 (e) of the Act from considering the effect of the deputization upon the propriety of enforcing the Board's order." Sec. 10 (e) provides that "No objection that has not been urged before the Board, its members, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The Court concluded that the language of the section referred to objections that might have been but were not raised before the Board, the deputization of these guards occurring after the Board had issued its

Order and after the court below had refused for the first time to enforce the order.

> "When circumstances do arise after the Board's order has been issued which may affect the propriety of enforcement of the order, the reviewing court has discretion to decide the matter itself or to remand it to the Board for further consideration. For example, where the order obviously has become moot, the court can deny enforcement without further ado * * *" (p. 1281).

The rule for which we contend is especially applicable to a proceeding, such as the instant one, in which the relief operates in *futuro*. Thus in cases in which an injunction is prayed, the appellate courts freely apply the law prevailing at the time of the disposition of the question on appeal, and not the law which prevailed at the time the decree appealed from was rendered. *Texas Company v. Brown*, 258 U. S. 466, 474; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 464; *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 201.

In the instant case an important circumstance has arisen since the issuance of the Board's Order and the Order of the Circuit Court of Appeals which affects the lower court's Order and the propriety of the enforcement of the Board's Order, and which should be considered by this Court. This circumstance, of course, is the enactment by Congress on June 23, 1947 of the Labor Management Relations Act, 1947, Title I of which, effective August 22, 1947, amends the National Labor Relations Act. The amendments that are relevant here are set forth beginning on page 6 of the foregoing petition.

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B. Subsequent relevant events leave the courts without power or jurisdiction to enforce the Board's Order in this case.

The National Labor Relations Board is a creature of statute. It has only those powers given it by statute.

Not only does Title I of the Labor Management Relations Act, 1947, in setting forth the powers of the National Labor Relations Board, expressly fail to give the Board power to continue processing an unfair labor practice case involving a practice which is no longer prohibited by the Act as amended, but it limits the continuing effect of Board action (taken in accord with the Act prior to amendment and not authorized in the amendments) solely to representation matters.

To be more explicit:

(1) The declaration of policy of the 1947 Act is contained in Section 1 of that Act. Subsection (b) of that section reads in part: "It is the purpose and policy of this Act to provide orderly and peaceful procedures * * *." In other words, Congress in the 1947 Act set up the procedures to be followed after the Act became law and after each of the titles became effective. As we have said, Title I became effective August 22, 1947. But Congress did not in Title I, which title is devoted to amendment of the National Labor Relations Act, provide for a procedure to carry on existing unfair labor practice cases involving supervisors. Rather, Section 101 of Title I amends Section 10 of the National Labor Relations Act, which latter section has to do with the enforcement of the Act. As amended, Section 10 reads in part "(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." However, there is no longer an unfair labor practice in Section 8 as to supervisors. There-

fore, Congress not only by subsection (b) of Section 1 of the 1947 Act, but as well by the amended Section 10 of the National Labor Relations Act, has clearly shown its intention not to have the processing of such a case as this one continued.

(2) The National Labor Relations Act, both before and subsequent to amendment, is made up of two subject matters. The first has to do with representation and the second with unfair labor practices. As far as representation is concerned, Section 103 of Title I of the 1947 Act provides that certifications of representatives or any determinations as to the appropriate collective bargaining unit, made under Section 9 of the National Labor Relations Act prior to amendment, shall remain in effect until one year after the date of certification or if in respect of which a collective bargaining contract was entered into prior to August 22, 1947, until the end of the contract period or until August 22, 1948, whichever occurs first. Thus Congress made provision in the 1947 Act for the continuing effect of representation matters as determined under the National Labor Relations Act prior to amendment and which representation matters are not in accord with the provisions of Title I of the 1947 Act. But it did not make provision for the continuance in effect of unfair labor practice cases not in accord with the 1947 statute. Thus it plainly showed its intention that on and after August 22, 1947 the latter should no longer be effective.

It cannot be ~~successively~~ successfully argued that Congress meaninglessly, as to unfair labor practice cases no longer supported by the Act as amended, provided only for the continuance in effect of pending representation matters not supported by the amendments. In the 1947 Act, when Congress desired to keep new provisions of that statute from affecting pending matters, it was careful to expressly so state. Thus Title II sets up a new agency to

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handle mediation and conciliation and new methods of procedure in respect thereto, and provides for the transfer of the functions of the old agency to the new. (Subsection (d) of Section 201). But it is expressly stated that "Such transfer shall not affect any proceedings pending" before the old agency "or any certification, order, rule, or regulation theretofore made by it (the old agency) or by the Secretary of Labor." In addition, Congress there provided as to "any proceedings" before the old agency. On the other hand, in Title I it states that it saves only representation matters in conflict with the amendments—not unfair labor practices no longer recognized as such.

It is not uncommon for Congress, in amending a federal statute, if it desires that all pending proceedings under that statute be concluded in accord with the statute prior to amendment, to say so. We have already referred to the fact that in Title I of the 1947 Act Congress expressly kept alive representation matters in conflict with the amendments to the National Labor Relations Act. Also, in Title II of the 1947 Act Congress expressly provided that pending mediation and conciliation matters should continue to a conclusion. In addition, we note for instance, that in Section 2 of the Act of June 19, 1936 (Title 15, U. S. C. A., Section 21a)—the Clayton Act—Congress expressly stated that "Nothing contained in this section or sections 13, 13a, 13b of this title shall affect rights of action arising or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on section 13 of this title, prior to June 19, 1936 * * *." Another example is the resolution passed by Congress, extending the life of the Emergency Price Control Act of 1942, as amended, to June 30, 1946, in which in Section 18 thereof it is provided that "any proceeding, petition, application or protest which was pending under the Emergency Price Control Act of 1942,

as amended, or the Stabilization Act of 1942, as amended, on June 30, 1946, shall be proceeded with and shall be effective in the same manner and to the same extent as if this Act had been enacted on June 30, 1946." The resolution so passed by Congress was approved July 25, 1946. Title 50, U. S. C. A., Appendix, Section 901a *et seq.*

In connection with the argument we are making, note the following:

> "In case a statute is repealed or rendered inoperative, no further proceedings can be had to enforce it in pending prosecutions unless competent authority has kept the statute alive for that purpose." *United States v. Chambers,* 291 U. S. 217, 223. "'By the repeal the legislative will is expressed that no further proceedings be had under the Act repealed.' See, also, *Norris v. Crocker,* 13 How. 429, 440; *Gulf, C. & S. F. Ry. Co. v. Dennis,* 224 U. S. 503, 506." Id., p. 223.

Even if it be considered that we are arguing for retroactive operation of the 1947 statute, it must be remembered that "The rule that statutes are to be given a prospective, rather than a retrospective, operation, is well recognized; but, like other rules of interpretation, it is resorted to to give effect to the presumed and reasonably probable intention of the Legislature, when the terms of the statute do not of themselves make it certain or clear, and cannot be invoked to change or defeat the intention when it is made obvious or manifest by the terms of the statute." *Lamb v. Powder River Live Stock Co.,* 8 Cir., 132 F. 434, 436.

That necessary implications may require giving retroactive effect to a statute is recognized in *Harvey v. Tyler,* 69 U. S. 328, 347.

The rule against a retroactive interpretation of a statute "is merely a more or less artificial aid in arriving at the true intention of the Legislature, and will not govern if in conflict with the general objectives of the legislation." *United States v. Balestra,* 3 Cir., 88 F. 2d 43, 44.

In *Smallwood v. Gallardo,* 275 U. S. 56, suits had been brought in the District Court of the United Statee for Porto Rico to restrain the collection of taxes imposed by the laws of Porto Rico. On January 7, 1927, the Circuit Court of Appeals affirmed decrees of the District Court dismissing the bills. On March 4, 1927, by c. 503, Section 7, of the Act of that year, Congress provided that Section 48 of the Act, which provides for civil government for Porto Rico, should be amended, among other things, to provide "That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico." 44 Stats. 1418, 1421. Writs of certiorari were granted by the Supreme Court on May 16, 1927. The Supreme Court held that the statute applied to existing suits, saying in part (p. 61):

> "• • • To apply the statute to present suits is not to give it retrospective effect but to take it literally and to carry out the policy that it embodies of preventing the Island from having its revenues held up by injunction; a policy no less applicable to these suits than to those begun at a later day, and a general policy of our law. Rev. Stat., Sec. 3224. So interpreted the Act as little interferes with existing rights of the petitioners as it does with those of future litigants. There is no vested right to an injunction against collecting illegal taxes and bringing these bills did not create one."

And on page 62:

> "Of course it does not matter tnat these cases had gone to a higher court. When the root is cut the branches fall. *McNutty v. Batty*, 10 How. 72."

Inasmuch, then, as the Board no longer has power to proceed with the instant case, it would seem to inevitably follow that the Order of the Sixth Circuit enforcing the Board's Order should be set aside due to the fact that that court has lost jurisdiction.

"It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law." *Railroad Co. v. Grant*, 98 U. S. 398, 401.

"It is clear, that when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction," even though that effect may not have been contemplated by Congress. *Insurance Company v. Ritchie*, 72 U. S. 541, 544, cited with approval in such cases as *Ex parte McCardle*, 74 U. S. 506, 514; *The Assessor v. Osbornes*, 76 U. S. 567, 573; *In re Hall, Petitioner*, 167 U. S. 38, 42.

II.

THE COURT WILL NOT LEND ITSELF TO REQUIRING A USELESS FORMALITY NO LONGER AUTHORIZED, COMMANDED OR SANCTIONED BY LAW

The enforcement of the Order of the Circuit Court of Appeals would mean that petitioner would be required to (1) cease and desist from discouraging membership in the Foreman's Association, etc., (2) offer Oscar Owens (a foreman) reinstatement, (3) make him whole as to any loss in pay, and (4) post a notice in which it would say to all of its employees that it would do the foregoing.

To require such action on the part of petitioner would be a useless formality no longer authorized, commanded or sanctioned by law.

What if petitioner did not cease and desist in discouraging membership in the foreman's union? There is no statute upon which to base contempt.

What if petitioner reinstated the foreman Owens and discharged him immediately thereafter? Where is there a statute upon which the Board could then proceed?

What if petitioner posted the notices and almost immediately destroyed them?

As for any money to be paid to the foreman Owens, as we shall hereinafter show beginning on page 42 hereof, the payment thereof was enforceable under the National Labor Relations Act, prior to its amendment by Title I of the Labor Management Relations Act, 1947, only in the public interest. No private right was involved. But now, due to the fact that supervisors are no longer within the guarantees of the National Labor Relations Act, as amended, there is no public right remaining in the matter. No public right would be served by giving to Owens, the

foreman, any money. Therefore, payment to him now would as well be a useless formality.

In *Mills v. Green,* 159 U. S. 651, this Court dismissed an appeal from a lower court without considering the merits of the case where, pending an appeal from a decree dismissing a bill in equity to secure the right to vote at an election of delegates to a constitutional convention, the election had been held and the convention had assembled on the days specified by statute.

The Court cited (p. 655) with approval *The State of Pennsylvania v. The Wheeling and Belmont Bridge Co.,* 18 How. 421. There this Court in 1852 granted an injunction against the construction and maintenance of a bridge because it would obstruct free navigation, but suspended enforcement for a limited time to allow the carrying out of a plan by which the obstruction to navigation might be removed. Later that year an act of Congress authorized the bridge at its then site and elevation. Two years later the bridge blew down. When defendant proposed to rebuild it according to the original plan, plaintiff secured in vacation an injunction, notwithstanding which defendant proceeded to erect the bridge. Then, upon defendant's motion to dissolve the injunction, plaintiff filed motions for an attachment for contempt, etc. This Court held that following the act of Congress the portion of its former decree which directed alteration or abatement of the bridge could not be carried into execution, and, therefore, refused attachment and dissolved the injunction.

In *Berry v. Davis,* 242 U. S. 468, a bill was filed to enjoin the State Board of Parole and others from performing vasectomy upon the plaintiff in accord with the state statute. An injunction issued and an appeal was taken to the Supreme Court. Thereafter the state statute was repealed. Citing the *Mills* case, *supra,* the bill was ordered

dismissed. To the same effect, see *Dinsmore v. Southern Express Co.*, 183 U. S. 115.

In connection with this phase of our argument, we repeat that we hereinafter point out (pages 42 through 45) that public rights and not private rights are protected by the National Labor Relations Act. The importance of that fact in relation to the law that a court will not order a useless thing to be done is emphasized by *Hodges v. Snyder*, 261 U. S. 600. There the plaintiffs, as resident taxpayers, filed a complaint in a state Circuit Court challenging the validity of a consolidated school district and praying that the school district should be enjoined from issuing bonds, etc. The state Supreme Court held that the attempted organization was not authorized by law and remanded the case for further proceedings. The Circuit Court thereupon issued a permanent injunction. Then the legislature passed a curative act. Whereupon defendants moved to set aside the injunction, the motion was denied, and on appeal the Supreme Court of the state remanded the case with direction to dissolve the injunction. Plaintiffs contended in the United States Supreme Court that the curative statute, not having been enacted until after the injunction had issued, deprived them, without due process, of private property rights which had vested in them under the adjudications. The Supreme Court said (p. 603):

> "It is true that, as they contend, the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the Court regardless of such legislation. • • •
>
> "This rule, however, as held in the *Wheeling Bridge* case (18 How. 421), does not apply to a suit brought for the enforcement of a public right which, even after it has been established by the

judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced; although, in so far as a private right has been incidentally established by such judgment, as for special damages to the plaintiff or for his costs, it may not be thus taken away. *Pennsylvania v. Wheeling Bridge Co., supra*, p. 431, 439. This case has been cited with approval in *The Clinton Bridge* case, *supra*, p. 463 (likewise involving a public, as distinguished from a private, right of action), *United States v. Klein, supra* (13 Wall. 128), p. 146, *Stockdale v. Insurance Companies, supra* (20 Wall. 323), p. 332, and *Mills v. Green, supra* (159 U. S. 651) p. 655. And so a judgment for the restitution of taxes collected under the ostensible authority of a general statute will be reversed when, after the rendition of such judgment, a statute has been passed legalizing and ratifying such taxation. *Rafferty v. Smith, Bell & Co., supra* (257 U. S. 226) p. 232.

"In the *Wheeling Bridge* case, as in the *Clinton Bridge* case, the public right involved was that of abating an obstruction to the navigation of a river. The right involved in the present suit, of enjoining the maintenance of an illegal school district and the issuance of its bonds, is likewise a public right shared by the plaintiffs with all other resident taxpayers. And while in the *Wheeling Bridge* case the bill was filed by the state, although partly in its proprietory capacity as the owner of certain canals and railways (9 How. 647, 648), the doctrine that a judgment declaring a public right may be annulled by subsequent legislation, applies with like force in the present suit, although brought by individuals primarily for their own benefit; the right involved and adjudged, in the one case as in the other, being public, not private.

"The judgment of the Supreme Court in this case affected merely the public right involved—the plaintiffs' judgment for costs not being impaired,—

and was clearly in accordance with the doctrine of the *Wheeling Bridge* case."

Thus it is evident that not only the cease and desist portion of the Board's Order in the instant case and the part of the order requiring reinstatement of Owens and posting of the notice, but the requirement of back pay to Owens, as well, all being public rights, may now, and should be denied enforcement.

III.

THE REMEDIAL OBJECTIVES OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, WOULD NOT BE ACHIEVED, NOR THE POLICIES OF THE ACT, AS AMENDED, BE EFFECTUATED, BY THE ENFORCEMENT OF THE ORDER OF THE SIXTH CIRCUIT

Without waiving the fact that the Board does not now have power to proceed with such a case as this one, and that the court lacks jurisdiction, for which reasons the Order of the Sixth Circuit should be set aside, petitioner urges that the remedial objectives of the Act, as amended, will not be achieved by the Order of the Sixth Circuit.

Section 10 (c) of the Act, prior to amendment and as amended by the 1947 Act, provides that the Board, if it concludes that an unfair labor practice has been engaged in or is being engaged in, may issue "an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

It is under the authority of this provision of the Act that the Board issued its Order (R. 55), digested on page 4 of the foregoing petition.

In commenting upon the extent of the authority thus granted the Board as to its orders, this Court, in *Republic Steel Corp. v. National Labor Relations Board,* 311 U. S. 7, 10, 12, said that "The Act is essentially remedial. It does not carry a penal program * * *. The Act does not prescribe penalties or fines * * * it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end. We think that affirmative action to 'effectuate the policies of this Act' is action to achieve the remedial objectives which the Act sets forth."

"The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing and avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." *Consolidated Edison Co. v. National Labor Relations Board,* 305 U. S. 197, 236.

"The authority to require affirmative action to 'effectuate the policies' of the Act is broad but it is not unlimited." *National Labor Relations Board v. Fansteel Metallurgical Corp.,* 306 U. S. 240, 257.

"It is the Board's order on behalf of the public that the court enforces." *Amalgamated Utility Workers v. Consolidated Edison Co.,* 309 U. S. 261, 269.

As to a reimbursement order, this Court, in *Virginia Electric & Power Co. v. National Labor Relations Board,* 319 U. S. 533, 543, said that such an "order is not a redress for a private wrong. Like a back pay order, it does restore to the employees in some measure what was

taken from them because of the Company's unfair labor practices. In this, both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are designed to aid in achieving the elimination of industrial conflict."

"No provision in it (the Act) authorizes an employee to make claim. The Act does not purport to confer, it does not confer, private rights * * *. The procedure the statute outlines is not designed to award, the orders it authorizes do not award, damages as such. The proceeding is not, it cannot be made, a private one to enforce a private right. It is a public procedure, looking only to public ends * * *. The statute authorizes reparation orders not in the interest of the employee, but in the interest of the public. A cease and desist order operating retrospectively is not a private award, operating by way of penalty or of damages. It is a public reparation order * * *." *Agwilines, Inc. v. National Labor Relations Board,* 5 Cir., 87 F. 2d 146, 150, 151, a case involving discharges. The foregoing is cited with approval by the Sixth Circuit in *National Labor Relations Board v. Colten,* 105 F. 2d 179, 182. And this Court has cited the *Agwilines Inc.* case as authority for the statement that "They (the Board's orders) vindicate public, not private rights." *Virginia Electric & Power Co. v. National Labor Relations Board, supra* p. 543.

The Act creates no private right. *National Labor Relations Board v. Sunshine Mining Co.,* 9 Cir., 125 F. 2d 757, 761, cert. denied 312 U. S. 678. A proceeding by the Board is "in the public interest It is neither punitive nor compensatory but preventative and remedial in na-

ture." *National Labor Relations Board v. Thompson Products, Inc.*, 6 Cir., 130 F. 2d 363, 367; *National Labor Relations Board v. Leviton Mfg. Co.*, 2 Cir., 111 F. 2d 619, 621.

The Order (R. 55) requires petitioner to cease and desist from discouraging membership in the Foremen's Association of America, etc. But the Act no longer requires petitioner to do so. (The Association's membership is limited to supervisors R. 293). Therefore no remedial objective would be accomplished by enforcing the Order. *Republic Steel Corporation* case, *supra.* Failure of petitioner to comply would not thwart the Act as amended, and there is no longer any reason to remove and avoid the consequences of something which is no longer guaranteed by the Act. *Consolidated Edison Co.*, case *supra.*

The Order also requires petitioner to offer Owens reinstatement and make him whole for loss of pay. But the power to command affirmative action is not punitive. *Republic Steel Corp.* case, *supra; Consolidated Edison Co.* case, *supra; Thompson Products Inc.* case, *supra; Leviton Mfg. Co.* case, *supra.* Nor does the Act create any private right. *Virginia Electric & Power Co.* case, *supra; Sunshine Mining Co.* case, *supra; Agwilines Inc.* case, *supra.* Nor is a proceeding under the Act compensatory. *Thompson Products, Inc.* case, *supra.* Nor is there any longer any reason to remove and avoid the consequences of something which is not now guaranteed. *Consolidated Edison Co.* case, *supra.* No remedial objective would be accomplished by enforcing reinstatement and back pay. *Republic Steel Corp.* case, *supra.*

The Order further requires petitioner to post, and keep posted for 60 days, a "Notice to All Employees" (R. 57) in which it agrees not to interfere with the organization of its supervisors and agrees to offer Owens reinstate-

ment and make him whole. To enforce this portion of the Order would not have a remedial objective or meet any of the other requirements of law as we have stated them in relation to the other portions of the Order.

It therefore follows that the remedial objectives of the Act would not be achieved and the policies of the Act would not be effectuated by allowing the Order of the Circuit Court of Appeals enforcing the Board's Order to stand.

IV.

THE OBJECTIVES AND POLICIES OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, WOULD BE FRUSTRATED BY THE ENFORCEMENT OF THE BOARD'S ORDER AS PROVIDED IN THE ORDER OF THE SAID CIRCUIT COURT OF APPEALS

Petitioner submits that not only would the remedial objectives of the Act, as amended, not be achieved, nor the policies of the Act, as amended, effectuated, by the enforcement of the Board's Order as provided in the Order of the Circuit Court of Appeals, but such objectives and policies would be frustrated.

The object of both the National Labor Relations Act and of the Labor Management Relations Act, 1947 is to promote industrial peace.

Industrial peace would be endangered by the enforcement of the Board's Order.

As we have said, that Order requires petitioner to (1) cease and desist from discouraging membership in a foremen's union, etc., (2) reinstate a foreman named Owens, (3) make him whole as to any lost wages, and (4) post copies of a notice in the plant and keep them posted for 60 days. The notice (R. 57) will inform the supervisors in

the plant, of whom there are about 136 (R. 187, 188), that petitioner has agreed to all the foregoing. The required notice reads (R. p. 57):

"Notice to All Employees."

"Pursuant to
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

"We will not in any manner interfere with, restrain, or coerce our supervisory employees in the exercise of their right to self-organization, to form, join, assist, or bargain collectively through Foreman's Association of America, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

"We will offer to Oscar Owens immediate and full reinstatement to his former and substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination.

"All our supervisory employees are free to become or remain members of the above-named union. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any supervisory employee because of membership in or activity on behalf of said labor organization.

Edward G. Budd Manufacturing
Company, (Employer)

By.....
(Representative) (Title)

Dated....."

In other words, for 60 days these 136 supervisors will be constantly told that under the law they are protected in unionizing and in demanding collective bargaining from their employer. The reinstatement of Owens with back pay will be held up before them as an example of what will happen to their employer if he resists their efforts to organize and force bargaining. Naturally the notice will bear fruit.

But then what will happen? The 136 will eventually learn that they are not protected in their organizational efforts by any statute; that no law requires their employer to collectively bargain with them; that their efforts as far as their employer is concerned were useless; and, in fact, that when the notice was first posted and all during the 60 days they were gravely misled.

Industrial peace will be frustrated.

CONCLUSION

Petitioner submits that because of the foregoing the writ of certiorari should issue as prayed.

The result of the enactment of the Labor Management Relations Act, 1947, and especially of Title I thereof, amending the National Labor Relations Act, effective August 22, 1947, has resulted in the decision of the said Circuit Court of Appeals deciding an important question of federal law which has not been, but should be settled by this Court, and, in addition, has resulted in the said Court's decision deciding a federal question in a way probably in conflict with applicable decisions of this Court.

Respectfully submitted,

EDWARD G. BUDD MANUFACTURING COMPANY,
By ARCHIBALD BROOMFIELD,
Attorney for Petitioner.
ALBERT E. MEDER,
BEAUMONT, SMITH & HARRIS.

August 26, 1947.

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